# How to reach a reasonable opinion

*Charles Wynn-Evans examines a recent Supreme Court decision considering a challenge to an employer's decision under provisions in an employment contract providing for the employer to determine a matter in its opinion*

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'*Braganza* presents the possibility of trust and confidence arguments being mounted in relation to employers' post-termination decisions.'

Employment lawyers will be familiar with the limitations that the common law places on employers' exercise of contractual discretions in the employment relationship, particularly when making discretionary bonus awards. A well-known line of cases has implied a term into the contract of employment to the effect that an employer must not determine a contractual but discretionary bonus award irrationally, perversely, arbitrarily or otherwise than in good faith (*Horkulak v Cantor Fitzgerald International* [2004], *Clark v Nomura International plc* [2000] and *Clark v BET plc* [1997]).

However, contractual powers to determine a specific issue may not always be framed as discretions per se. An employer may be entitled, under the express terms of the contract, to determine a matter on the basis of its opinion. The question then arises of on what basis the courts will interfere to ensure that the employer does not abuse this contractual power. In *Braganza v BP Shipping Ltd* [2015], the Supreme Court addressed the proper approach to a challenge to the employer's decision in relation to such a provision and demonstrates that the scope for scrutiny differs according to the nature of the decision which an employer makes (per Lord Hodge at para 56).

## Facts

The decision challenged in this litigation was about whether a Mr Braganza, the chief engineer of a BP tanker who disappeared from the vessel one night, committed suicide or suffered an accidental death. Certain death benefits were payable to his widow unless, in the company's opinion, his death resulted from his:

> ... wilful act, default or misconduct whether at sea or ashore.

BP commissioned a report into the matter. Extensive enquiries were conducted over several months, which considered five possible scenarios. Three of these were discounted – that Mr Braganza hid or had been hidden on board, had been collected by another vessel or had fallen from the vessel as a result of horseplay, an altercation or foul play.

Of the two remaining possibilities, the investigators concluded for various reasons that suicide, rather than an accident, was the most likely reason for Mr Braganza's disappearance. On the basis of this report, BP decided not to pay death benefits to Mrs Braganza, prompting proceedings in which she contended that BP's decision constituted a breach of contract.

## First instance decision

As BP sought to rely on the relevant provision to deny Mrs Braganza the relevant death benefits, it bore the burden of proving that its opinion was a reasonable one. On the evidence at first instance, Teare J was unable to

make a finding about the cause of Mr Braganza's death. In his judgement, there was a real possibility, but it was not more likely than not, that he had fallen overboard. However, he concluded that the breach of contract claim was made out because some of the investigators' factual findings were not tenable and BP failed to discharge its burden of proof. In doing so, he noted that it was common ground between the parties that the employer's opinion had to be 'reasonable' in the traditional public law sense (as established in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] and subsequently applied to the exercise of a contractual discretion in *The Vainqueur José* [1979]).

Teare J held that the investigation team did not direct itself that:

> ... before making a finding of suicide there should be cogent evidence commensurate with or proportionate to the seriousness of a finding of suicide.

The investigators had therefore failed to take into account the real possibility that Mr Braganza had gone out on deck to check the weather to see whether it was safe to carry out certain planned work. On this basis, the investigators, and by extension the BP officer who relied on their report, a Mr Sullivan, had not directed themselves properly and failed to take into account a relevant matter when forming their opinion.

Allowing an appeal, the Court of Appeal concluded that in all the circumstances BP's decision was a reasonable one, reached after an appropriate, detailed and careful enquiry.

## Issues before the Supreme Court

Two issues addressed by the Supreme Court are of particular interest:

- the precise nature of the test that the decision of a 'contractual fact-finder' must be a reasonable one; and
- the proper approach of a contractual fact-finder to considering whether a person may have committed suicide – and in particular whether the fact-finder must bear in mind the need for cogent evidence before forming an opinion.

Consistent with the reasoning of Rix LJ in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008], the Supreme Court agreed unanimously that a contractual decision-making power is:

> ... limited, as a matter of necessary implication, by concepts of honesty, good faith and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality.

Moreover, the Supreme Court held that both limbs of the *Wednesbury* test should apply ie:

- the decision maker must consider all relevant matters and exclude from consideration irrelevant matters; and
- the decision must not be one that no reasonable decision maker could have made.

Nonetheless, different views were taken of the requisite degree of scrutiny in an employment context.

## Majority ruling

The majority did not expect the decision maker to achieve the forensic accuracy and precision of a court of law. Lady Hale (with whom Lord Kerr concurred) agreed with Mocatta J's observation at p577 of *The Vainqueur José*, on which the Court of Appeal had relied in overruling Teare J's decision, that:

> ... it would be a mistake to expect [of a lay body] the same expert, professional and almost microscopic investigation of the problems, both factual and legal, that is demanded of a suit in a court of law.

Moreover, she considered that 'some slight misdirection' might not matter if it were clear that the employer's decision would have been the same even if it had properly appreciated the legal position (at para 31). Nonetheless, Lady Hale considered that (para 36):

> ... employers can reasonably be expected to inform themselves as to the principles which are relevant to the decisions they have to make [and] can reasonably be expected to know how they should approach making the important decisions they are required or empowered to make.

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Similarly, as Lord Hodge put it (at para 57), the employer's decision on a matter of fact is:

> ... not a judicial determination and the court cannot expect judicial reasoning.

However, he could see no reason why the employer's decision should be scrutinised on a basis:

> ... any less intense than that which the court applies to the decision of a public authority which is charged with making a finding of fact.

### Trust and confidence

Moreover, Lord Hodge and Lady Hale both considered that the employer has to exercise its decision-making function in accordance with the implied obligation of trust and confidence. As Lord Hodge put it, in contrast to a purely commercial case (para 55):

> ... the personal relationship which employment involves may justify a more intense scrutiny of the employer's decision-making process.

More specifically, he considered that the duty of trust and confidence should not be treated as 'flying off at the moment of the employee's death'. A failure to comply with the trust and confidence obligation in the circumstances of *Braganza* would 'betray the trust of the deceased employee' (para 54).

**Factoring improbability into a decision**

Applying these principles to this case, Lady Hale considered (at para 38) that the decision maker should not simply have accepted the investigation team's view that suicide was the most likely explanation for Mr Braganza's disappearance. Mr Sullivan should have asked himself whether the evidence was sufficiently cogent to overcome the 'inherent improbability' of suicide, especially given BP's access to in-house legal expertise to guide it in the decision-making process (para 39). This was especially the case in the absence of any positive indications of suicide. Mr Braganza's behaviour had appeared entirely normal and there was a good deal of evidence that he was concerned about the weather, which would have constituted a good work-related reason for him to go on deck that morning.

Furthermore, Lady Hale found that BP ought to have considered that Mr Braganza was a Roman Catholic and therefore for him suicide was a mortal sin. In her analysis (at para 41), this increased the 'inherent improbability' of Mr Braganza committing suicide 'and the corresponding need for cogent evidence to support a positive finding'. While not arbitrary, capricious or perverse, the decision (para 42):

> ... was unreasonable in the *Wednesbury* sense, having been formed without taking relevant matters into account.

Likewise, Lord Hodge made clear (at para 60) that, given the improbability of suicide in this case, there had to be cogent evidence to overcome that improbability. He did not consider that such evidence had been produced.

Consequently, the majority concluded that Teare J was correct to decide that the investigation team's report and conclusion could not be regarded as sufficiently cogent evidence to justify the positive opinion that Mr Braganza had committed suicide. The breach of contract claim therefore succeeded.

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## Minority ruling

The minority in the Supreme Court took an approach more consistent with the discretionary bonus case law. They rejected the contentions that in an employment case a higher degree of scrutiny of the employer's decision is required than in a commercial context and that the implied duty to maintain trust and confidence has a role to play.

In particular, Lord Neuberger considered (at para 104) that the implied duty of trust and confidence was irrelevant because it added nothing to the requirements that the investigation be conducted with 'honesty, good faith and genuineness' and that the employer avoid 'arbitrariness, capriciousness, perversity and irrationality'. As he put it, somewhat starkly:

> ... the investigation was properly carried out or it was not, either there was enough evidence ...or there was not.

On this basis, the minority held not only that the evidence available to BP was sufficiently cogent to support its decision but also that the employer was not required to direct itself as to the need for cogent evidence. Lord Neuberger considered (at para 126) that the investigation team's reports were:

> ... impressive both in the extent of the investigations on which they were based and the care with which they were compiled, and the conclusion they reached was carefully and rationally explained.

Mr Sullivan could not therefore be criticised for relying on them.

## Trust and confidence post-termination

*Braganza* is of interest for the support it potentially provides (subject to the strong dissenting view of Lord Neuberger) to the nascent argument that some form of trust and confidence obligation can survive termination of employment. It can be argued that *Braganza* is very much a fact-specific case and that a more general role for trust and confidence post-termination has not been established and is not appropriate. Nonetheless, the case does present the possibility of arguments based on trust and confidence being run to seek to challenge other post-termination decisions by employers. For example, such arguments might be used to challenge a decision that a participant in a bonus or other incentive arrangement is a 'bad leaver'.

It has to be said that *Braganza* refers in simple terms to the obligation of 'trust and confidence' and understandably does not reflect Lord Steyn's more detailed formulation in *Malik v BCCI* [1997]. *Malik*, of course, addressed an extant employment relationship rather than one which had terminated and defined the implied term of trust and confidence as providing that the:

> ... employer must not, without reasonable and proper cause, conduct

> itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

It will be interesting to see if this line of argument is developed in subsequent cases.

### Impact on bonus decisions

A further question which *Braganza* presents is whether it in any way operates to alter the position under the earlier case law on discretionary bonus awards. This case law was referred in *Braganza* on the basis that it is, in effect, consistent with the principles which the decision expounds. This is correct to the extent that the degree of scrutiny applied by the court will depend on the context, subject of course to the overarching application of the principles derived from *Wednesbury* and the associated cases. However, Lord Hodge considered (at para 57) that the courts are in a better position to review the rationality of a decision on 'whether or not a state of fact existed' than a discretionary decision to award a bonus in the absence of specific performance criteria or bonus formulae. Such a discretionary award allows 'little scope for intensive scrutiny of the decision making process'.

It therefore appears that, except where the relevant contractual or bonus scheme provisions require a bonus decision to be based on findings of fact, *Braganza* does not materially affect the discretionary bonus case law. As demonstrated by *Commerzbank AG v Keen* [2006], this case law does not require the employer to give reasons for its decision and, as Mummery LJ put it (at para 69), requires:

> ... an overwhelming case to persuade the court to find that the level of a discretionary bonus payment was irrational or perverse in an area where so much must depend on the discretionary judgment of the bank in fluctuating markets and labour conditions.

### Contract provisions

Detailed provisions in senior executives' contracts of employment will often address the circumstances in which the employer may dismiss the executive summarily and without notice. Whether the employer can validly rely on these provisions can be of considerable financial significance for executives with long notice periods and sizeable remuneration packages.

Some of the circumstances in which an executive's contract will permit summary dismissal will be matters of objective fact – for example, whether they have committed gross misconduct or serious breach of contract or have been disqualified as a director or convicted of a criminal offence. Whether the employer is entitled to dismiss in such circumstances remains a matter of proof of the factual position based on the applicable test of the balance of probabilities.

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However, summary dismissal may also be permitted by contractual provisions providing for the employer to determine the matter in its opinion. This may be the case if the employer considers that the executive has not met the standard of performance required or has, in its opinion, brought it into disrepute.

When negotiating these provisions, the executive may seek to water down the employer's unilateral power, for example by requiring that its opinion be reasonable. Nonetheless, where such provisions are in place, the principles outlined in *Braganza* will potentially be highly relevant to their operation and to an executive's ability to challenge an employer's decision to terminate in reliance on them.

### Conclusions

*Braganza* presents the possibility of trust and confidence arguments being mounted in relation to employers' post-termination decisions. In addition, it serves as a useful reminder that, even where contractual provisions state that a matter is to be decided by the employer in its opinion, the employee may be able to challenge that employer's decision on the basis of the public law test of *Wednesbury*. The factual background to a decision not only needs to be carefully considered to reach a 'safe' decision. Employers' decisions will be all the less susceptible to challenge the more carefully they are structured by reference to the issues and the relevant evidence in order to demonstrate the justification for and robustness of the eventual decision.

The decision also highlights that the intensiveness of the court's review varies depending on the context. The more improbable the event being considered, the greater the need for cogent evidence to support the employer's decision that it happened and the more fact-based the decision, the greater the level of substantive scrutiny in which the court is prepared to engage. ■

*Associated Provincial Picture Houses Limited v Wednesbury Corporation*
[1948] 1 KB 223

*Braganza v BP Shipping Ltd*
[2015] UKSC 17

*Clark v BET plc*
[1997] IRLR 348

*Clark v Nomura International plc*
[2000] IRLR 766

*Commerzbank AG v Keen*
[2006] EWCA Civ 1536

*Horkulak v Cantor Fitzgerald International*
[2004] EWCA Civ 1287

*Malik and another v Bank Of Credit & Commerce International SA (in compulsory liquidation)*
[1997] UKHL 23

*Socimer International Bank Ltd v Standard Bank London Ltd*
[2008] EWCA Civ 116

*The Vainqueur José*
[1979] 1 Lloyds Rep 557